

Brown (Migration) [2019] AATA 3130 (17 June 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Enesi Brown

CASE NUMBER: 1838193

DIBP REFERENCE(S): OSF2008006151

MEMBER: Frances Simmons

DATE: **17 June 2019**

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Spouse) visa:

- cl.100.211(2)(b) and (c) of Schedule 2 to the Regulations

Statement made on 17 June 2019 at 6:29pm

1. **CATCHWORDS**

2. *MIGRATION – Federal Circuit Court Remittal – Partner (Migrant) (Class BC) – Subclass 100 (Spouse) – application was not received within prescribed timeframe – notification was defective – Tribunal erred in finding that the review application was lodged out of time – applicant and sponsor have a mutual commitment – genuine spousal relationship – decision under review remitted*

3.

4. **LEGISLATION**

Administrative Appeals Tribunal Act (Cth), s 29

Migration Act 1958 (Cth), ss 5F, 65, 66, 360(2)(a)

Migration Regulations 1994 (Cth), Schedule 2 cl 100.211, r 1.15A

CASES

Beni v MIBP [2018] FCAFC 228

Brown v Minister for Immigration and Border Protection [2018] FCA 1643

Brown v MHA (No.2) [2018] FCA 1787

DFQ17 v Minister for Immigration and Border Protection [2019] FCAFC 64

Grey v MIBP [2018] FCCA 1564

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 14 December 2016 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant applied for the visa on 2 October 2008 on the basis of his relationship with his sponsor. At that time, Class BC contained two subclasses: Subclass 100 (Spouse) and 110 (Interdependency). The applicant has made claims only for the Subclass 100 visa and does not claim to be in an interdependent relationship as required by Subclass 110.
7. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter, the primary criteria include cl.100.221.
8. For the following reasons, the Tribunal has concluded that the Tribunal has jurisdiction to consider this matter and that the matter should be remitted for reconsideration. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of Mr Brown on the basis of the material before it, pursuant to s.360(2)(a) of the Act.

THE JURISDICTIONAL ISSUE

9. This case has a long and unfortunate history.
10. The applicant applied for the Partner (Provisional) (UF 309) visa and Partner (Migrant) (BC 100) visa on 2 October 2008, nominating Mrs Roselyn Upu Brown as the sponsor. This application for Partner (Provisional) (UF 309) visa was refused on 14 April 2009. After successfully applying to the Migration Review Tribunal for review of the department's decision, the application was remitted to the Department for reconsideration on 26 May 2010 and on 16 June 2011, the applicant was granted a Partner (Provisional) (UF 309) visa.
11. On 14 December 2016 the delegate in this case refused to grant the Partner (Migrant) (BC 100) visa because the delegate was unable to obtain further evidence substantiating the ongoing and genuine nature of the relationship and therefore was not satisfied that the applicant met cl.100.221. The applicant then applied to the Tribunal for a review of the decision on 16 January 2017. The Tribunal, differently constituted, determined it had no jurisdiction because a valid application was not received within prescribed timeframe. At this time it was accepted that the prescribed time limits for making a review application to the MR Division could not be extended.
12. The applicant then sought judicial review of the Tribunal's decision. On 12 March 2018, the Federal Circuit Court dismissed Mr Brown's application for judicial review and Mr Brown appealed this decision. On 19 November 2018, a single judge of Federal Court handed down a judgment *Brown v MHA (No.2)* [2018] FCA 1787 which found that the MR Division of the Tribunal has the power under s 29(7) of the *Administrative Appeals Tribunal Act 1975* (AAT Act) to extend the time in which an applicant may make a review application to the Tribunal. Therefore, Judge Greenwood ordered that Mr Brown's matter be remitted to the Tribunal in order to determine the constructive application made by the appellant to the Tribunal for an extension of time for the lodging of his application for review of the decision of the delegate to refuse the grant of a Partner (Migrant) (Class BC) visa under the

provisions of the *Migration Act 1958* (Cth), being a constructive application arising out of the act of the appellant lodging with the Tribunal the application for review on 16 January 2017, although the time prescribed by the Act and the *Migration Regulations 1994* (Cth) for doing so had expired on 13 January 2017.

13. This matter was constituted to the Tribunal on 5 April 2019.
14. On 14 December 2018, the Full Federal Court handed down a judgment (*Beni v MIBP* [2018] FCAFC 228) which found that the MR Division of the Tribunal does not have the power to extend the time in which an applicant may make a review application to the Tribunal. The Court in *Beni* held that s.29 of the AAT Act, which permits the AAT to extend the time for the making of an application to the Tribunal, does not apply to applications made to the Migration and Refugee Division. This judgment restored the long held position that the prescribed time limits for making a review application to the MR Division cannot be extended and overturned the judgment of *Brown v MHA* (No. 2) [2018] FCA 1787. Accordingly, the Tribunal does not have the power to extend which the timeframe in which Mr Brown is required to make the review application.
15. The Tribunal considered whether it has jurisdiction in this matter.
16. Section 66 of the Migration Act sets out the notification requirements that the Minister must comply with in notifying decisions to refuse to grant a visa on, or after, 10 August 2001. The obligation in s.66(2)(d)(ii) to state the time in which the review application may be made requires that it be conveyed in a complete and clear manner.¹ In a judgment handed down in April 2019 the Full Federal Court in *DFQ17 v Minister for Immigration and Border Protection* [2019] FCAFC 64 found a notification letter that was posted did not comply with the requirement to state the time in which the application for review may be made (as required by s.66(2)(d)(ii)). The consequence of this finding was that the time in which the applicant could apply for review had not started to run, and because the notification was defective the Tribunal erred in finding that the review application was lodged out of time and that it did not have jurisdiction.
17. The Tribunal has reviewed the primary decision notification letter dated 14 December 2016² to determine if it is affected by the decision in *DFQ17*. In *DFQ17* the Court held that the departmental notification failed to clearly convey the time in which the application for review may be made because the notification letter was 'piecemeal, entirely obscure and essentially incomprehensible'. This was because the information to determine the time period was in three places in the departmental notification letter, requiring the applicant to note the date of the notification letter, the prescribed period to apply for review and the date on which the applicant was taken to have received the notification letter (7 working days after the date of the document) and then calculate the relevant date.
18. In the present case, the information in the notification letter indicating the prescribed period (page 1) is separate from the information about when the person is taken to have been notified (page 3); and the decision letter was despatched by post within Australia to the applicant, requiring the applicant to have regard to the difference between days and working days. In the Tribunal's opinion, *DFQ17 v MIBP* [2019] FCAFC 64 affects this case. The Tribunal finds that the letter notifying Mr Brown of the Department's decision is defective as it does not clearly state the time in which the application for review may be made (as required by s.66(2)(d)(ii)). The consequence of this is that the prescribed period for lodging an application for review has not started to run.

¹*DFQ17 v MIBP* [2019] FCAFC 64 (Rares, Perram and Farrell JJ, 18 April 2019).

² Case No 1700811/1838193

19. Therefore, Mr Brown's application is not out of time. To be valid an application for review of a Part 5 reviewable decision must be accompanied by at least half of the prescribed fee and a request for a fee reduction, and the fee or at least half the prescribed fee and the fee reduction request must be received by the Tribunal prior to the expiry of the prescribed period.³ However, in Mr Brown's case, the prescribed period hasn't commenced due to the defective notification issue. Therefore, having determined that the prescribed period for lodging the review application had not commenced, Mr Brown's fee reduction request was considered and a determination was made to grant the request for a fee reduction. Mr Brown was then notified of the outcome and the requirement to pay the half the prescribed fee, a request with which he duly complied.
20. The Tribunal finds that Mr Brown has made a valid application for review and the Tribunal has jurisdiction in this case.

21. CONSIDERATION OF CLAIMS AND EVIDENCE

22. The issue in the present case is whether the applicant and his wife continue to be in an ongoing and genuine spousal relationship.

Whether the parties are in a 'spouse' relationship

23. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, amongst other things, that at the time of this decision, the applicant is the spouse of the 'sponsoring spouse'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring spouse' is the person who was specified as the applicant's spouse or intended spouse in the related Subclass 309 application. In the present case the applicant claims to be the spouse of the sponsor, a 'sponsoring spouse' within the meaning of that term.
24. 'Spouse' is defined in r.1.15A of the Regulations and provides that a person is the spouse of another where the two persons are either in a married or de facto relationship. Persons are in a de facto relationship if they are not validly married to each other. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: r.1.15A(1A). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

25. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal finds that the parties married in Brisbane on 18 August 2008.
26. The Tribunal has viewed the couple's marriage certificate and finds they were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a) of the Act.
27. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by r.1.15A(1A)(a).

Are the other requirements for a spousal relationship met?

28. The delegate made, in essence, a 'no evidence' decision, documenting in the decision the attempts that were made to contact the applicant's former migration agent in an ultimately futile attempt to obtain supporting evidence of the applicant's relationship with his sponsor.
29. On 4 June 2019 the Tribunal wrote to the applicant and requested information about the applicant's spousal relationship. The Tribunal has considered the additional evidence provided by the applicant and his sponsor, including the birth certificates for their child, Alexander Brown, who was born in Logan Hospital, Meadowbrook in Queensland on 8 March 2011 and which records that his father is the applicant and his mother is the sponsoring partner. Further evidence submitted to the Tribunal includes: statements from the sponsor and visa applicant dated 22 April 2019; the birth certificate of Alexander Brown; Mrs Brown's social security records; tenancy agreement signed by the sponsor and the applicant, dated 24 March 2016; a letter from Centerlink, dated 27 January 2017, explaining why the sponsor was paid at a single rate notwithstanding that she had a partner; extracts of Tribunal case 0904890; photographs of the applicant, Mrs Brown and their son Alexander along with other members of their family; a letter from Dakabin State School, dated 10 June 2019, stating that Alexander Brown is currently enrolled in this school and his parents are listed as Mr Enesi Brown and Mrs Roselyn Brown; copies of the applicant's current drivers' license and current drivers' license of Mrs Brown recording that the parties reside at the same address in Dakabin; recent correspondence from a Queensland government department addressed to Mr Enesi and letters addressed to the sponsor showing the same address in Dakabin.

Financial aspects of the relationship

30. The applicant and his sponsor have provided the Tribunal with a tenancy agreement which they have both signed. The applicant and his sponsor have also provided correspondence from Centrelink which indicates that, as a result of the applicant's immigration status, the applicant's sponsor is receiving benefits as a single partner even though she has a partner and notes that the sponsor and the applicant declares he is not currently working. Mrs Brown has informed the Tribunal that he relies upon her for support and their financial circumstances are strained. There is no evidence before the Tribunal that the parties have joint assets. However, the visa applicant's circumstances in Australia have been uncertain and this may have limited the parties' ability to combine their financial affairs.

Nature of the household

31. The Tribunal finds that the applicant and his sponsor reside together with the applicant's son. As noted above, the applicant and his sponsor have provided the Tribunal with evidence that they live together and it is apparent based on material before the Tribunal that they care for each other and provide each other with emotional support. The Tribunal also accepts that Mrs Brown provides her husband with financial support.

Social aspects of the relationship

32. The applicant has provided limited supporting documentation of the social aspects of the relationship, including photographs of the applicant and his sponsor, together with their child in a family setting, members of their family and friends, and school records indicating that the parents of Alexander Brown are listed as Mr Enesi Brown and Mrs Roselyn Brown and statements by the parties about their relationship. While noting that corroborating documentary evidence of the social aspects of the relationship is somewhat limited, the Tribunal is mindful that the applicant is not represented and has not always been cognisant of what material evidence is relevant to provide as evidence of the spousal relationship.

Nature of the parties commitment to each other

33. The Tribunal finds that the parties have had a child since their marriage, now aged 8. The evidence before the Tribunal indicates that the applicant and the sponsoring partner are very clearly committed to each other and this was apparent in the reasoning of the judge of the Federal Circuit Court who observed that the dilemma created by Mr Brown lodging his review application out of time was a “rather sad state of affairs”, before observing:

This has not been an easy matter. It would take someone with a heart of stone not to be moved not just by the pleas of the Applicant, but especially the pleas of the wife and child, who sit dutifully in the back of [the] Court.⁴

34. For the reasons given above the Tribunal has resolved the preliminary question of whether it has the jurisdiction to consider the merits of this matter in the applicant's favour. After determining the letter notifying the applicant of the department's decision to be defective, the Tribunal contacted the applicant by telephone and spoke to Mr and Mrs Brown to explain why he must pay the application fee to make a valid application. While this discussion concerned the requirement to pay a fee to make a valid application, in the Tribunal's view it would be difficult to have a conversation with Mr and Mrs Brown without forming the impression that they were in a committed, long-term relationship.
35. The Tribunal accepts that the applicants have lived together since the applicant arrived in Australia, share a child together, and clearly see their relationship as a long-term one. The evidence before the Tribunal indicates that they have been resolute in their commitment and support of each other in the face of adversity and the rigid particularities of Australian immigration law. In such circumstances, the Tribunal does not need to have a hearing to be persuaded of the nature and depth of the parties' commitment to each other.
36. *Are the parties living together or not living separately apart on a permanent basis.*
37. Based on the evidence provided by the applicant and his sponsor, including a 2016 tenancy agreement in both parties' name and the documents indicating that they currently reside at the same address, the Tribunal accepts the parties are living together. The parties have explained that because of Mr Brown's current immigration status he cannot be named on the lease but Mrs Brown writes that they live together under the same roof and has requested confirmation from housing program that he lives with Mrs Brown and their son. The Tribunal notes that the applicant's drivers' license, which was issued in 2019, indicates he lives at the same address at Mrs Brown as does other recent correspondence provided to the Tribunal.
38. On the evidence before it, the Tribunal finds that the parties are living together and have done so since the applicant last entered Australia on 25 January 2014. The Tribunal notes the applicant previously arrived in Australia on 7 November 2009 and departed on 11 January 2014 before returning to Australia on 25 January 2014 and there is nothing before the Tribunal that would indicate that the parties were not living together during this period. It is noted that the Tribunal (differently constituted) that remitted the decision to refuse the applicant a partner (provisional) (UF309) visa for reconsideration undertook a very detailed assessment of the parties' evidence and was satisfied that they did have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship was genuine and continuing at the time of that decision on 26 May 2010.
39. Overall, the evidence before the Tribunal strongly supports the conclusion that the financial aspects of the relationship, nature of their household, social aspects of their relationship, and in particular the nature of the parties' ongoing commitment to each other, as well as all the

⁴*Brown v Minister for Immigration and Border Protection* [2018] FCA 1643, [27].

other circumstances of the relationship demonstrate that they are in a genuine married relationship: r.1.15A(3).

40. The Tribunal finds that applicant and sponsor have a mutual commitment to a shared life to the exclusion of all others, are in a genuine and continuing relationship, and live together in Dakabin, Queensland with their child and do not live separately and apart on a permanent basis. They, therefore, meet all the requirements in s.5F(2)(b), (c), and (d) of the Act.
41. Given these findings the Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship. Therefore the applicant meets cl.100.221(2)(b) and cl.100.221(2)(c).
42. The Tribunal has found that the requirements of cl.100.221(2)(b) and (c) are met. Given that the applicant previously held a Subclass 309 visa that ceased on notification of the decision of the Minister to refuse a Subclass 100 visa, it is appropriate for the Tribunal to remit the application to the Minister to consider the remaining criteria for the visa including cl. 100.221(4A).
43. If the applicant meets the remaining criteria, the applicant will be entitled to the grant of a Subclass 100 visa.

CONCLUSION

44. Given the findings above, the appropriate course is to remit the application to the Minister to consider the remaining criteria for a Subclass 100 visa.

DECISION

45. The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Spouse) visa:
 - cl.100.221(2)(b) and (c) of Schedule 2 to the Regulations.
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Frances Simmons
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

...

- (3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:
- (ad) a Partner (Migrant) (Class BC) visa; or
 - (ae) a Partner (Provisional) (Class UF) visa; or
 - (af) a Partner (Residence) (Class BS) visa; or
 - (ag) a Partner (Temporary) (Class UK) visa;
- the Minister must have regard to all of the circumstances of the relationship, including, in particular:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses;
 - (b) the nature of the household, including:
 - (i) any joint responsibility for care and support of children, if any; and
 - (ii) the parties' living arrangements; and
 - (iii) any sharing of responsibility for housework;
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities;
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).
- (5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.